

The FCC has misintepreted the TCPA and its own regulations regarding the established business relationship exception. Section (b)(1)(C) of the TCPA makes certain acts unlawful, including "the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine". While other subsections of Section (b)(1) address "telephone calls", Section (b)(1)(C) does not use or incorporate the term "telephone calls" to describe the TCPA's prohibition against sending unauthorized advertisements by fax. The term "telephone calls" is determinative of whether a party may escape a violation of the TCPA where a solicitation is made to a person or entity with whom the party has a pre-existing business relationship. In regulations governing the TCPA, the FCC determined that a "telephone call" using an artificial or prerecorded message made by a party to a person or entity with whom the party shares a prior business relationship does not violate the TCPA. 47 CFR Section 64.1200(c)(3). However, this exception applies only to calls using an artificial or prerecorded messages set forth in Section 64.1200(a)(2). There is no language in Section 64.1200 or the TCPA that makes the a "pre-existing business relationship" an exception to the prohibition against sending unsolicited advertisement via facsimile.